# Unexpected Convergence: Values, Assumptions, and the Right to Strike in Public and Private Sectors, 1945-2005

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Significantly, James B. Atleson opened his path-breaking book *Values and Assumptions in American Labor Law* by addressing "the right to strike," and its "false promises and underlying premises."[1] With his opening sentences he cited the Supreme Court's decision in the 1938 case of *NLRB v. Mackay Radio & Telegraph Company*,[2] in which the majority held that nothing in the recently enacted National Labor Relations Act should be construed to deprive an employer in a strike of "the right to protect and continue his business by supplying places left vacant by strikers."[3] Atleson went on in his first chapter to explain that these lines inserted in dicta, which had no direct bearing on the disposition of the case, lines that were little noted at the time they were delivered but became crucial to the later development of labor law and the constriction of union power, spoke to a "historical continuity of values reflected in judicial opinions" in which judges granted special deference to "productivity, hierarchical control, and continued production."[4] In the immediate wake of the Wagner Act's passage, Atleson made clear, judges were already moving to restrain expressions of labor solidarity that threatened employers' freedoms, reaffirming values that sharply eroded the act's ability to actually foster union organization as its preamble made clear it was intended to do.[5] It was from looking at the courts' treatment of the right to strike that Atleson took his

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1. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19 (1983).

2. 304 U.S. 333 (1938).

3. *Id.* at 345.

4. ATLESON, *supra* note 1, at 33.

5. *Id.* at 19-33.

bearings on the values and assumptions that informed American labor law—and rightly so, for no aspect of labor law better reveals the general orientation of that law than its position on the most elemental confrontation between workers and employers: the strike.

Even as Atleson wrote these words, the enormous importance of the *Mackay* doctrine was only just beginning to be understood. That doctrine, which lay for decades like an unexploded bomb under the foundations of U.S. labor relations, went off with tremendous force just when Atleson was preparing his book for publication. The size of the explosion could not have been predicted even five years earlier. For, although the *Mackay* decision had explicitly recognized the right of employers to permanently replace strikers in economic strikes, prominent examples of employers utilizing this right were few before the 1980s.[6] Large employers were generally reluctant to be seen as breaking strikes, and thus dividing communities. To be sure, as Michael LeRoy has documented, the use of permanent replacement workers began to rise in the late 1970s.[7] But it was not until President Ronald Reagan's firing of more than 11,000 highly trained air traffic controllers forty-eight hours into their 1981 strike that the permanent replacement tactic became fully legitimized and began to assume a central role in American labor relations.[8] Once Reagan permanently replaced the striking members of the Professional Air Traffic Controllers Organization (PATCO) and showed that the public would support such an action, a number of prominent private sector employers followed suit.[9] In the 1980s, Phelps-Dodge, Greyhound, International Paper, Hormel, and others imitated Reagan's example. The results were disastrous for labor. By the end of the century, the strike—workers' most reliable tool of leverage—was disappearing from labor's arsenal. During the 1950s, the United States averaged more than 350 major work stoppages—defined as conflicts involving at least 1,000 workers for one day. In the new millennium, that annual average dropped to under twenty-five. The

6. Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991*, 16 BERKELEY J. EMP. & LAB. L. 169, 176 (1995).

7. *Id.* at 178.

8. H.R. REP. NO. 102-57, at 20 (1991).

9. *Id.*

power imbalance between employers and striking workers that the *Mackay* doctrine anchored firmly in law helped determine this outcome, and its impact began playing out even as Atleson drafted his book, in which he presciently cited that doctrine as the preeminent example of the values and assumptions embedded in American labor law.

Yet it is important to note that the PATCO strike, which helped activate the latent power of the *Mackay* doctrine, was an illegal strike of federal workers—employees of the Federal Aviation Administration (FAA).[10] Because it was a public sector strike, it was not governed by the body of law derived from the Wagner Act, or the subsequent decisions of the National Labor Relations Board, which were the focus of Atleson's research. Significantly, Atleson himself did not interrogate the values and assumptions of public sector labor law at all in his account. His book concerned private sector labor law only. Thus, there was no need for him to consider the PATCO strike, the implications of which put the *Mackay* doctrine into stark relief even as he sent his book to press. Atleson's focus on the private sector in his important book made perfect sense. It would have been impossible to adequately treat both public sector and private sector labor law in a volume that aimed to revise our understanding of the assumptions that lay at the base of labor law. Public sector labor law developed along a different track, without a unifying national structure like the Wagner Act, and thus resisted the sort of probing analysis that Atleson brought to bear in examining private sector labor law.[11] Yet, if the decision to treat the history of private sector U.S. labor law apart from the history of its public sector counterpart was understandable when Atleson was pioneering a new approach to the history of U.S. labor law in the 1980s,

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10. *See* United States v. Prof'l Air Traffic Controllers Org., 525 F. Supp. 820 (E.D. Mich. 1991).

11. Atleson was not alone in this. The other legal scholars who joined him in fleshing out a fresh approach to the history of labor law in the 1980s—Christopher Tomlins, Karl Klare, and Katherine Van Wezel Stone among them—also ignored public sector labor law in their seminal works. *See generally* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

it makes less sense now, more than twenty-five years after the appearance of Atleson's seminal book. For reasons that have become clearer since the publication of *Values and Assumptions*, continuing to treat public and private sector labor law separately causes us to miss an important truth. As the rise of post-PATCO strike-breaking in the private sector demonstrated so clearly, developments in one sector could have enormous impacts in the other.

In what follows, I would like to argue three interrelated propositions. First, that the history of private labor law over the past half-century cannot be properly understood without appreciating its relationship to public sector labor law. Second, that the law's position on the right to strike—which Atleson used as an approriate gauge of the law's underlying assumptions—is the best terrain upon which to examine exactly how closely intertwined public and private sector labor dynamics were in the half-century after World War II, and remain to this day. And third, that the relationship between public and private sector labor law and practice between 1955 and 2005 complicates the view of labor law that Atleson offered in 1983, confirming some aspects of his groundbreaking argument, while inviting a revision of others.

I develop these arguments by briefly tracing the relationship between public and private sector labor law and practice regarding the right to strike across three distinct periods. During the first period, the years between 1945 and the mid-1970s, I argue that developments in the private sector contributed to the increasing liberalization of the strike right in the public sector in ways that James Atleson's work does not prepare us to understand. In his analysis of the *Mackay* doctrine, Atleson held that the Supreme Court intended to "balance" labor's right to strike against the employer's right to operate in order to check the strike weapon with the counter weapon of striker replacement.[12] In inventing such a balance, Atleson contended, the court in effect ruled that "the employer's interest is sufficient to destroy the statutory right to strike . . . ."[13] To be sure, Atleson made a compelling case for the disempowering impact of this "modern emphasis on 'balancing' of conflicting inter-

12. ATLESON, *supra* note 1, at 29.

13. *Id.*

ests" on workers and unions in the private sector.[14] But, as viewed from the perspective of public sector workers in the first three decades after World War II, the "balancing" imperative identified by Atleson takes on a very different significance. If, in the private sector, the "balancing" notion functioned to weaken the strike weapon, the reverse was true in the public sector during this period. Public sector workers and their allies repeatedly cited the private sector model and the importance of "balancing" power between workers and employers in order to win more liberal laws and practices, and to justify their strikes, whether they were waged legally or, as was usually the case, illegally.

During the second period—the tumultuous years between 1975 and 1981—I argue that developments in the public and private sector intersected in a different way. During these years, the labor relations patterns that had taken shape during the previous decades in both the public and private sector began to break down under the combined weight of soaring inflation, de-industrialization, deregulation, and the first effects of a new wave of global economic integration, among other causes. Amidst this crisis, efforts by some in Congress to reform labor law in both public and private sectors failed, and employers in both sectors began to adopt a more confrontational approach to labor relations. In many ways, public sector employers led the way in this turn toward confrontation. It was they, more than their private sector counterparts, who normalized strike-breaking as a way of dealing with labor disputes, thus unleashing the latent power of *Mackay*. Ronald Reagan was scarcely alone in contributing to this development; Democratic politicians also played a key role in the story.

During the third period, after 1981, patterns in public and private sector law and practice converged once again, but in a different way than unionists had once hoped. Having seen public sector employers help lead the way in the normalization of striker replacement, private sector employers followed suit in the 1980s, invoking their *Mackay* rights, breaking a series of prominent strikes, and often explicitly acknowledging Ronald Reagan as their inspiration. As a result of employers' new aggressiveness and the increasingly unfavorable tilt in the terrain of political economy, workers' willingness to use the strike weapon plum-

14. *Id.*

meted. By the early twenty-first century, an ironic development was clear. Although private sector strikes were still "legal," their use had become nearly as infrequent as public sector strikes had been in the post-World War II era when such strikes were illegal in all jurisdictions.

## I. THE PULL OF THE PRIVATE SECTOR MODEL: LEGITIMIZING THE PUBLIC SECTOR STRIKE, 1945-75

When the Supreme Court was promulgating its *Mackay* Doctrine, public sector workers in the United States did not enjoy the right of collective bargaining, let alone the right to strike. The disastrous Boston Police Strike of 1919 had cut short a movement to organize public sector workers during the World War I era, and, according to Joseph Slater, helped create "a central, ongoing, and debilitating fact of life for public sector unions" and "an almost complete lack of legal rights."[15] Nor was there much hope of government workers reversing this trend during the New Deal era—not if Franklin D. Roosevelt had anything to say about it. Roosevelt believed that "militant tactics have no place in the functions of any organization of government employees."[16] In his mind, the idea that government workers ought to enjoy the same rights as private sector workers, including the right to strike, was simply "unthinkable and intolerable."[17] The courts agreed with Roosevelt. In the 1943 case of *Railway Mail Ass'n v. Murphy*, New York's Supreme Court held that merely to "tolerate or recognize any combination of . . . employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded."[18]

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15. JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962, at 71 (2004). For a discussion of the impact of the Boston Police Strike, see *id.* at 13-38.

16. STERLING D. SPERO, GOVERNMENT AS EMPLOYER 2 (S. Ill. Univ. Press 1972) (1948).

17. *Id.* Unions did obtain collective bargaining in isolated pockets of the federal government, such as the Tennessee Valley Authority. *See generally* MICHAEL L. BROOKSHIRE & MICHAEL D. ROGERS, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT: THE TVA EXPERIENCE (1977).

18. Joseph E. Slater, *The Court Does* Not *Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector*

In the immediate aftermath of World War II there was no sign that this broad animus toward public sector unionization or strikes would abate any time soon. Indeed, when some public sector workers dared to join the post-war strike wave, they paid a high price for their actions. When 2,400 Buffalo teachers walked off their jobs seeking higher pay on February 24, 1947, they surprised city and state officials and won significant raises after defying firing threats and remaining "absent from work" for one week.[19] But their victory triggered a political backlash. Prodded by Governor Thomas E. Dewey, the New York State Legislature passed the Condon-Wadlin Act just weeks after the Buffalo walkout. The New York law provided for the automatic dismissal of public sector strikers.[20] Seven other states passed similar laws in 1947, including Ohio's Ferguson Act and Michigan's Hutchinson Act.[21] Congress also weighed in. In 1946, a Democrat-controlled Congress rushed through Public Law 419, which made it illegal for Congress to use federal funds to pay any employee who belonged to an organization "asserting the right to strike against the United States," and required employees to sign an affidavit denying their membership in such organizations.[22] The following year, the Republican-controlled 80th Congress included an explicit ban on strikes by federal workers in the Taft-Hartley Act.[23] As Allan Weisenfeld observed, the law in these years tended to regard government workers' strikes as "akin to treason."[24]

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*Labor Law*, 79 OR. L. REV. 981, 981 (2000) (quoting Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (1943)).

19. Buffalo Corporation Counsel Fred C. Maloney announced the strikers had abandoned their positions and could be dismissed without a hearing. The teachers called their action not a "strike," but an "abstention from work." Benjamin Fine, *Buffalo Teachers Paralyze Schools in Strike Over Pay*, N.Y. TIMES, Feb. 25, 1947, at 1; *see also Buffalo Teachers End Their Strike on Pay Rise Offer*, N.Y. TIMES, Mar. 3, 1947, at 1.

20. *Dewey Bill Ousts Public Strikers*, N.Y. TIMES, Mar. 6, 1947, at 1; *see also* Leo Egan, *Bill to Bar Strikes by Public Workers Goes to Governor*, N.Y. TIMES, Mar. 14, 1947, at 1.

21. Gordon T. Nesvig, *The New Dimensions of the Strike Question*, PUB. ADMIN. REV. 126, 129 (1968).

22. SPERO, *supra* note 16, at 28.

23. *Id.* at 29.

24. Allan Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 LAB. L.J. 685, 686 (1965).

Yet, despite the galvanization of legal penalties and political opposition to public sector strikes after World War II, something remarkable happened over the next twenty years: government workers began to win collective bargaining rights at the federal, state, and local level. As they did, they increasingly defied the laws that denied their right to strike, in some cases winning de facto recognition of that right—which led employers to refrain from pursuing the penalties prescribed by law—in others winning reductions in the penalties against striking, and in a few settings achieving outright legalization of strikes. Public sector workers made these gains in part by claiming that the "balance" that labor law had claimed to create between employers and workers in the private sector had not only enhanced the citizenship of private sector workers, it had also led to increased productivity and labor peace. If the private sector model were transferred to the public sector, they argued, it would both lead to more efficient and responsive government and end the public sector employees' status as "second class citizens."[25]

For government workers to effectively make such arguments, however, required two prerequisites: the stabilization of private sector labor relations after World War II and the routinization of the private sector strike. By the mid-1950s, private sector labor relations had taken on a degree of stability and predictability it lacked during the turbulent 1930s and in the postwar battles when unions and employers still probed the contours of collective bargaining. The meaning of industrial democracy, once a malleable and contested term, had begun to narrow to the point where it signified nothing more than collective bargaining, and its fruits—increased wages and benefits, seniority systems, and grievance structures—and bargaining itself had begun to settle into predictable patterns. Unions had grown more bureaucratic, Communists had been purged from their leadership, and the once antagonistic AFL and CIO had moved toward unity. Yet these developments, which historians often point to as evidence of labor's dissipation, scarcely signaled any reluctance by unions to strike. To the contrary,

25. For a useful treatment of the changing law and way of thinking about government strikes, see generally Kurt L. Hanslowe & John L. Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055 (1982).

the 1950s proved to be the most strike-prone decade, as Jack Metzgar reminds us. The records for the highest annual number of major strikes and number of striking workers recorded by the Bureau of Labor Statistics were set in 1952; and the record for worker-hours lost due to strike action was set in 1959.[26] Yet, the 1950s strikes generally differed from those of previous decades in one important respect: since employers rarely engaged in the sort of strike-breaking activities that had aroused the interest of the La-Follette committee in the 1930s, strikes were less violent.[27] Indeed, strikes had become increasingly routine conflicts. This, in turn, opened the door to a reconsideration of unionization and collective bargaining in the public sector.

As the 1950s began, a growing number of voices began to compare public sector labor relations unfavorably with those in the private sector. Some of those voices came from unlikely quarters. The Hoover Commission report on the organization of the executive branch, for one, faulted the federal government for having "lagged behind American industry in improving employer-employee relations."[28] A growing chorus chimed in. In his 1952 book, *The Unfinished Business of Civil Service Reform*, William Seal Carpenter argued that "the merit system benefits from support and criticism by alert employee groups."[29] It was counterproductive to treat government employees as "a class of political eunuchs," Carpenter argued, since "[l]oyalty is not a product of coercive measures."[30] He insisted that problems in the employer-employee relationship in the public sector could be "solved only by patient negotiation among all parties concerned."[31] In 1955, a special committee of the American Bar

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26. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WROK STOPPAGES INVOLVING 1,000 OR MORE WORKERS, 1947-2008 (2008) http://www.bls.gov/news.release/wkstp.t01.htm. On the largest strike of the strike-prone 1950s, see JACK METZGAR, STRIKING STEEL: SOLIDARITY REMEMBERED (2000).

27. For background on the LaFollette Committee, see Gilbert J. Gall, *Heber Blankenhorn, the Lafollette Committee, and the Irony of Industrial Repression*, 23 LAB. HIST. 246 (1982).

28. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, THE HOOVER COMMISSION REPORT 125 (1949).

29. WILLIAM SEAL CARPENTER, THE UNFINISHED BUSINESS OF CIVIL SERVICE REFORM 78 (1952).

30. *Id.* at 68-69.

31. *Id.* at 69.

Association called the labor practices of the federal government "an apparent anachronism," and argued that a "government which imposes on other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis."[32] It was time for government to set the example for industry "by being perhaps more considerate than the law requires of private enterprise."[33] In his 1956 volume, *Public Personnel Administration*, O. Glenn Stahl argued that Congress ought to allow into the federal service "a considerable range for collective bargaining even of the orthodox type."[34] And in 1958, Charles O. Gregory pointed out the irony that "the greatest 'employer' of all, so sensitive to the needs of employees generally to organize into unions and engage in free collective bargaining for the maximization of their working standards, is shortsightedly unable to perceive that its own workers might regard similar procedures as necessary to their welfare."[35] By outlawing strikes in the federal service, "Congress indulged in sheer suppression, without any safety valve at all."[36]

As an early chronicler of these developments, Wilson R. Hart, later explained, there was a growing feeling in the 1950s that the federal government's "paternalistic attitude toward its employees" was "more fitting to a benevolent despot than to the world's greatest democracy."[37] Thus, bills calling for federal employee collective bargaining were introduced in every legislative session between 1949 and 1961.[38] The most ambitious of these, sponsored by Senator Olin D. Johnston of South Carolina and Representative George Rhodes of Pennsylvania, would have required federal agency heads to recognize unions and to negotiate policies

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32. WILSON R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 3 (1961).

33. *Id.*

34. O. GLENN STAHL, PUBLIC PERSONNEL ADMINISTRATION 289 (4th ed. 1956).

35. CHARLES O. GREGORY, LABOR AND THE LAW 521 (2d rev. ed. 1961).

36. *Id.*

37. Wilson R. Hart, *The U.S. Civil Service Learns to Live with Executive Order 10,988: An Interim Appraisal*, 17 INDUS. & LAB. REL. REV. 203, 210 (1964).

38. SAR A. LEVITAN & ALEXANDRA B. NODEN, WORKING FOR THE SOVEREIGN: EMPLOYEE RELATIONS IN THE FEDERAL GOVERNMENT 13 (1983).

related to promotions, layoffs, and grievance procedures.[39]

Even as support grew for the introduction of collective bargaining in the federal service, municipal employees began to bargain collectively for the first time in New York and Philadelphia.[40] In 1959, Wisconsin governor Gaylord Nelson signed the first state-wide bill granting collective bargaining to public employees.[41] And finally, on January 17, 1962, President John F. Kennedy headed off legislative efforts to enact a collective bargaining statute for the federal government by issuing an executive order that granted limited bargaining rights to federal workers.[42] Emphasizing the growing sense that government labor relations were adopting the private sector model, AFL-CIO president George Meany called Kennedy's Executive Order 10,988 "the equivalent of a Wagner Act for public employees."[43] In fact, it was far from that, for Kennedy's order did not grant one key right protected by the Wagner Act: the right to strike. Like the 1959 Wisconsin law, or the municipal legislation that Mayor Robert Wagner, Jr. signed inaugurating collective bargaining in New York City, Kennedy's order explicitly banned strikes by the workers it covered.[44]

Most trade unionists were not concerned by the reiteration of strike bans in the laws and executive orders that liberalized collective bargaining in the public sector. As the movement to secure bargaining rights in government gathered momentum, union supporters understood the need to separate the right to bargain from the right to strike. They tended to take one of two approaches to emphasize this se-

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39. *Union Recognition: Hearings on S. 3593 Before the S. Comm. on Post Office and Civil Serv.*, 84th Cong. 1, 123, 263 (1956) (hearings on May 15, May 24, and June 14); Jerry Kluttz, *Leader of Union Accuses Government of "Union Busting,"* WASH. POST & TIMES HERALD, May 15, 1956, at 17.

40. *See* MARK H. MAIER, CITY UNIONS: MANAGING DISCONTENT IN NEW YORK CITY 44-56 (1987); Francis Ryan, Everyone Royalty: AFSCME, Municipal Workers and Urban Power in Philadelphia, 1921-1983, ch. 4 (2003) (published Ph.D. dissertation, University of Pennsylvania), *available at* ProQuest, http://proquest.umi.com/pqdlink?did=765663891&Fmt=6&clientId=39334&RQT=309&VName=PQD.

41. SLATER, *supra* note 15, at 158-92.

42. *Id.* at 190.

43. JOSEPH C. GOULDEN, MEANY 327 (1972).

44. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

paration. First, they disavowed any desire to win the right to strike: "At no time, including the present, have they sought to gain such a right," assured William C. Doherty, President of the National Association of Letter Carriers in 1956.[45] Government workers' unions "operate on the basis of the principle that they do not exercise, or wish to exercise, the right to strike," added AFL-CIO president George Meany.[46] Second, they argued that the extension of bargaining rights in government would be an effective way to *prevent* strikes: "The more the spirit of democracy permeates the employer-employee relationship in government service, the less occasion there will be for government strikes," argued David Ziskind, an early proponent of this tack.[47] As collective bargaining began to spread in government in the early 1960s, skeptics had difficulty challenging either of these arguments, for government workers' walkouts were few in number. During the first half of the 1960s, the Bureau of Labor Statistics recorded an annual average of only thirty-three public sector strikes.[48]

Yet a startling thing occurred in the second half of the 1960s: federal, state, and local government strikes increased six-fold, reaching 411 in 1969, a level more than ten-times higher than the 1959 figure.[49] This militant trend received a boost from the successful walkout of New York City transit workers in defiance of the Condon-Wadlin Act in January

45. William C. Doherty, *Government Workers and Organization*, AM. FEDERATIONIST, June 1956, at 9.

46. George Meany, President, AFL-CIO, Remarks at the Joint G.E.C. Legislative Conference (May 14, 1957) (transcript available in the George Meany Memorial Archives in AFL, AFL-CIO Dep't of Legis. (1906-1978) Legis. Reference Files, file 50, Gov't Employees Council, AFL-CIO, 1956/01-1959/12).

47. DAVID ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES 259 (Leon Stein & Philip Taft eds., Arno Press Inc. 1971) (1940). Howie McClennan, who rose to the presidency of the International Association of Fire Fighters in the 1960s, made a similar point. Unless workers enjoyed the full "benefits of collective bargaining," McClennan warned, they would "be forced to take strike action which is a symbol of the breakdown of the bargaining process." *Court Upholds Constitutionality of N.C. Law Prohibiting Agreements with Public Employees*, [Oct.–Dec.] Gov't Empl. Rel. Rep. (BNA) No. 585, at B-5 (Dec. 16, 1974).

48. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORK STOPPAGES IN GOVERNMENT, 1972, at 3 (1973).

49. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2110, WORK STOPPAGES IN GOVERNMENT, 1980, at 4 tbl.1 (1981).

1966. Union leader Mike Quill went to jail for calling that strike, but his members escaped the firing penalty prescribed by New York law and won a significant settlement. President Lyndon Johnson fumed that the resulting contract was "not in the national interest," but labor drew a different lesson. The New York settlement gave municipal workers elsewhere "something to shoot for," as Philadelphia union leaders put it.[50] By 1966, as one Illinois state investigation found, the idea of work stoppages by public employees was no longer "as instinctively repugnant as it was during the celebrated Boston police strike."[51]

The unfolding civil rights struggle of these years clearly influenced changing views of government workers' rights to organize and strike in at least two ways. First, it bred a new consciousness that led government workers to cast off the identity of "civil *servant*" in favor of that of the aggrieved *worker*. As historian Robert Zieger aptly noted, "'[p]ublic servants,' a phrase smacking of the old gentility, became 'government workers,' more descriptive of the people who toiled at grimy social services offices and on the city road maintenance crews and garbage trucks."[52] This was a crucial part of what one contemporary analyst called a "major change" in the "role conception" of the government worker.[53] Second, civil rights marchers' non-violent civil disobedience encouraged public workers to themselves defy the law when they felt justified in their struggle for justice. As another analyst explained, "[w]hen acts of civil disobedience become everyday occurrences, the fact that public employee strikes are illegal" would no longer be "enough to prevent them."[54]

These developments undermined the notion that government workers should not enjoy the same rights as private sector workers. As Ken Lyons, president of the inde-

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50. *Impact of New York Transit Strike and Settlement Foreseen on Public Employee Bargaining*, [Jan.-Mar.] Gov't Empl. Rel. Rep. (BNA) No. 123, at B-1, B-3 (Jan. 17, 1966).

51. JAMES T. MOONEY, ILL. LEGISLATIVE COUNCIL, STRIKES BY PUBLIC EMPLOYEES 4 (1966).

52. ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985, at 163 (1986).

53. CARY HERSHEY, PROTEST IN THE PUBLIC SERVICE 1 (1973).

54. Hugh O'Neill, *The Growth of Municipal Employee Unions*, 30 PROC. OF THE ACAD. OF POL. SCI. 1, 13 (1970).

pendent National Association of Government Employees (NAGE), put it, government workers were "second-class citizens who have finally grown up to demand recognition."[55] Public workers increasingly compared their lot unfavorably to workers in the private sector, rejecting the idea that they deserved fewer rights. "The thin line of separation between public and private employment is fast being obliterated," observed Al Bilik of the American Federation of State, County, and Municipal Employees (AFSCME).[56] He insisted that the time had come to "fight for all trade union rights for public employees NOW!"[57] By 1967, the AFL-CIO was citing a "restless mood among government employees," stemming from their "inability to obtain the same gains workers in private industry have achieved through collective bargaining."[58]

In this context, the fact that they could not legally strike became increasingly unacceptable to government workers. "It is almost impossible to define the difference between a strike in the public service and a strike in the private sector," added Victor Gotbaum of AFSCME, "[t]he problems are identical in the private sector or the public sector."[59] AFSCME, the fastest growing union in the public sector, and its fiery leader, Jerry Wurf, helped lead the charge against strike bans. At its July 1966 executive board meeting, the union officially reversed its past position and demanded "the right of public employees—except for police and other law enforcement officers—to strike."[60] "To forestall this right," AFSCME argued, "is to handicap the free

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55. Alton Ashley, *Labor-Management Rift Widens Employee Discontent Mounts*, FEDNEWS, May 5, 1967, at 20, 20.

56. Al Bilik, *"The Other Fourteen Percent": Public Employees as Workers and Citizens in the U.S.*, *in* PROBLEMS CONFRONTING UNION ORGANIZATION IN PUBLIC EMPLOYMENT 25, 33 (Eugene C. Hagburg ed., 1966).

57. *Id.*

58. AFL-CIO, Program to Improve Collective Bargaining in the Federal Service 1 (Sept. 28, 1967) (program recommendation, on file with the George Meany Memorial Archives in AFL, AFL-CIO Dep't of Legis. (1906-1978) Legis. Reference Files, file 54, Gov't Employees Council, AFL-CIO, 1967/03-1967/09).

59. Victor Gotbaum, *Collective Bargaining and the Union Leader*, *in* PUBLIC WORKERS AND PUBLIC UNIONS 77, 81 (Sam Zagoria ed., 1972).

60. International Executive Board, AFSCME, AFL-CIO, *Policy Statement on Public Employee Unions: Rights and Responsibilities*, *in* SORRY . . . NO GOVERNMENT TODAY: UNIONS VS. CITY HALL 67, 68 (Robert E. Walsh ed., 1969).

collective bargaining process."[61]

Other unions followed AFSCME's lead. By 1968, even federal sector unions began to assert the right to strike.[62] The postal clerks and the National Postal Union dropped no-strike clauses from their union constitutions that year.[63] By July 1968, the *Washington Post* worried that "militants" would "try to eliminate the no-strike provisions from union constitutions next month at half a dozen national conventions."[64] In September, Lyons's NAGE became "the first white-collar organization to drop its no-strike promise."[65] Only after a bitter floor fight did the American Federation of Government Employees (AFGE) overwhelmingly reject a move to excise the long-standing no-strike clause from its constitution.[66]

Beyond labor's ranks, an increasing number of liberal voices—such as the National Council of Churches—attacked the notion that government workers should be denied the right to strike "solely by virtue of their public employment."[67] As the 1970s began, a swelling chorus of influential voices demanded the extension of public sector strike rights.[68]

In many ways, this shift in thinking was the product of necessity. Whatever one thought about the wisdom of public sector strikes, there was no denying the increasingly common reality of government workers' strikes or the fact that existing strike penalties had little deterrent effect. When

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61. *Id.*

62. MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 374-75 (1976).

63. *Id.* at 375.

64. Jerry Kluttz, *Militancy Developing Among Civil Servants*, WASH. POST, July 7, 1968, at A22; *see also* Mike Causey, *Government Strike Talk Grows*, WASH. POST, Oct. 9, 1967, at A18; Jerry Kluttz & Mike Causey, *Watson Plans Aid for Postal Workers*, WASH. POST, Aug. 20, 1968, at A11.

65. Mike Causey, *NAGE Rejects No-Strike Vow*, WASH. POST, Sept. 23, 1968, at A22.

66. Mike Causey, *Union Votes Down Move to Drop No-Strike Vow*, WASH. POST, Sept. 12, 1968, at A26.

67. AFL-CIO News, *3 Major Faiths Sound Themes of Racial Justice, Right to Strike*, *in* SORRY . . . NO GOVERNMENT TODAY: UNIONS VS. CITY HALL, *supra* note 60, at 232-33.

68. *Id.*

hundreds of thousands of postal workers staged the largest public sector walkout to that point in U.S. history in March 1970, they faced no significant penalties. Rather, they reaped benefits—their strike helped bring about the Postal Reform Act through which they won the right to bargain over their compensation for the first time. Their example, in turn, inspired government workers at local, state, and federal levels.[69]

As strikes spread, government unionists developed effective new arguments justifying their right to strike. Some insisted that because government employers routinely refused to negotiate with unions during an illegal strike, strikes became unnecessarily protracted.[70] Others held that because governments were rarely in a position to follow through on the automatic dismissal of government strikers, the strike bans were impossible to enforce. "Law which fails to command general respect, indeed, that is often the object of contempt, surely is worse than no law at all," argued AFSCME's Bilik.[71] The "unrestricted right to strike" would serve as "a more reliable deterrent to irresponsible action than is the restrictive statute," he argued.[72] Other union supporters pointed out that government workers needed the right to strike in order to "create equality at the table," a prerequisite for labor peace.[73] The "only mechanism that

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69. In the first half of the 1970s, the country averaged 377 government workers' strikes annually—ten times the rate of a decade earlier. BUREAU OF LABOR STATISTICS, *supra* note 48 at 4.

70. The Council of State Governments concluded that strike bans were ineffective and urged states to enact collective bargaining laws. *See* COUNCIL OF STATE GOV'TS, STATE-LOCAL EMPLOYEE LABOR RELATIONS (1970).

71. Al Bilik, *Toward Public Sector Equality: Extending the Strike Privilege*, 21 LAB. L.J. 338, 341 (1970).

72. *Id.* at 356. Ida Klaus, who had advised both Mayor Robert Wagner of New York and the Kennedy administration on collective bargaining made the same point. "The integrity of government is threatened when government provokes disrespect for its own processes," she observed. "It is far better to have no law and no sanctions." Ida Klaus, Dir. of Staff Relations, N.Y. City Bd. of Educ., Address at the Conference on Public Employment and Collective Bargaining at the University of Chicago's Center for Continuing Education (Mar. 12, 1966), *quoted in* [Jan.-Apr.] Gov't Empl. Rel. Rep. (BNA) No. 133, at D-5 (Mar. 28, 1966).

73. *Agreement to Limit Arbitrator's Power Cements New FAA-Machinists Agreement*, [July-Sept.] Gov't Empl. Rel. Rep. (BNA) No. 565, at A-5, A-9 (July

produces meaningful, good faith bargaining, and the best deterrent to a strike, is the threat of one," explained Rosemary Trump of the Service Employees.[74] All such arguments shared the notion that government labor policy ought to increasingly resemble private sector policy and the idea that the more these models converged, the better public sector labor relations would become. As AFL-CIO official Thomas R. Donahue put it, "[t]he closer the public employee unions can bring themselves and their styles to the private sector model, the more productive their efforts are going to be."[75]

It was not only union leaders who came to believe that public sector labor relations ought to adopt private sector approaches.[76] There was a clear shift in opinion among labor relations professionals on this question between the mid-1960s and the mid-1970s. When the Twentieth Century Fund formed a task force in 1969 to recommend policies to deal with public sector labor, the right to strike was the one issue on which the group could reach no consensus.[77] But by the early 1970s, more professionals were beginning to agree with the influential mediator Theodore Kheel, who championed the notion that in the public sector, as in the private, it was necessary to balance the weapons held by employers and employees in order to achieve just results in collective bargaining. "The threat to strike informs the bargaining process with that element necessary to bring about a bargain," Kheel insisted.[78] Cornell professor and arbitrator Phillip Ross agreed, predicting that government labor rela-

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29, 1974) (quoting Vincent J. Paterno, President of the Association of Civilian Technicians (ACT)).

74. Rosemary Trump, Remarks at the SEIU Public Workers Conference 94 (Nov. 13-16, 1978) (excerpts available in the Cornell University Library).

75. Thomas R. Donahue, *What Do Unions Want?*, *in* BUREAU OF NAT'L AFFAIRS, THE CRISIS IN PUBLIC EMPLOYEE RELATIONS IN THE DECADE OF THE SEVENTIES 35, 37 (Richard J. Murphy & Morris Sackman eds., 1970).

76. Charles M. Rehmus, *Labor Relations in the Public Sector in the United States*, *in* PUBLIC EMPLOYMENT LABOR RELATIONS: AN OVERVIEW OF ELEVEN NATIONS 19, 40-41 (Charles M. Rehmus ed., 1975).

77. TWENTIETH CENTURY FUND, PICKETS AT CITY HALL: REPORT AND RECOMMENDATIONS OF THE TWENTIETH CENTURY FUND TASK FORCE ON LABOR DISPUTES IN PUBLIC EMPLOYMENT 20-26 (1970).

78. Theodore W. Kheel, *Summation*, *in* PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON PUBLIC EMPLOYMENT LABOR RELATIONS, MAY 3-5, 1971 at 214 (1971).

tions would soon come "close to current private sector practice" because the present model of government labor relations was "utterly inconsistent with the American tradition of collective bargaining."[79]

An increasing number of judges also came to share this view by the late 1960s. Prior to this time, the disposition of the courts had long been uniformly hostile to the strike rights of government workers. Courts repeatedly held that public employee strikes were unlawful "in the absence of specific legislative authorization";[80] that public employees had no constitutional right to strike;[81] and that public employers had the right to seek injunctive relief against strikes by their employees.[82] But as the 1970s began, "thoughtful judges" increasingly "questioned the wisdom and propriety of permitting the absolute prohibition of the public sector strike," according to two students of this question.[83] One of the most influential judges to do so was J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia, whose opinion in the case generated by the 1970 postal strike argued for the inseparability of unions and strikes.[84]

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79. Cornell Professor Says EO 11491 is Inherently "Unstable" to Degree That It Deviates from Private Sector Practice, [Apr.-June] Gov't Empl. Rel. Rep. (BNA) No. 611, at A-2, A-3 (June 23, 1975).

80. Ariz. Bd. of Regents v. Commc'n Workers of Am., 72 L.R.R.M. (BNA) 2264, 2265 (Ariz. Super. Ct. 1969); Pinellas County Classroom Teachers Ass'n v. Bd. of Pub. Instruction of Pinellas County, 214 So. 2d 34, 38 (Fla. 1968); City of Manchester v. Manchester Teachers Guild, 131 A.2d 59, 62 (N.H. 1957); Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 324 P.2d 1099, 1103 (Wash. 1958).

81. *City of Manchester*, 131 A.2d at 61; City of New York v. De Lury, 243 N.E.2d 128, 132 (N.Y. 1968); Abbott v. Myers, 251 N.E.2d 869, 876 (Ohio Ct. App. 1969); Kirker v. Moore, 308 F. Supp. 615, 621 (S.D.W. Va. 1970). Nor were there grounds to contend that the denial of strike rights for public employees amounted to a denial of equal protection. *In re* Block, 236 A.2d 589, 592 (N.J. 1967); *De Lury*, 243 N.E.2d at 129, 133; Rankin v. Shanker, 242 N.E.2d 802, 805-06 (N.Y. 1968).

82. Norwalk Teachers' Ass'n v. Bd. of Educ., 83 A.2d 482, 484 (Conn. 1951); City of Minot v. Gen. Drivers and Helpers Union No. 74, 142 N.W.2d 612, 617 (N.D. 1966); City of Pawtucket v. Pawtucket Teachers' Alliance Local 930, 141 A.2d 624, 629 (R.I. 1958).

83. Kurt L. Hanslowe & John L. Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1074 (1982).

84. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), *aff'd* 404 U.S. 802, 885 (1971).

He wrote:

> If the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness.[85]

By the mid-1970s more judges were sharing Wright's view. In 1975, for example, the Montana Supreme Court ruled that public workers had the right to strike.[86] Two years later a California court of appeals scrapped the no-strike oaths used by many of the state's municipalities.[87] In general, courts gave increasing credence to the notion that government workers needed the right to strike to equalize their bargaining power with management.

The public also seemed increasingly willing to accept this reasoning. In 1972, mediator Arnold Zack marveled that "[t]he public ha[d] overcome its initial blind fear of the public employee strike, and ha[d] learned to adapt its daily living to the illegal action."[88] Polling confirmed this as well. For example, a 1975 Harris poll found that a slight plurality supported the right to strike even for firefighters and police officers.[89]

It did not take long for the shift in thinking to be expressed in the political arena. Eight states granted strike rights to public employees between 1967 and 1977.[90] Congress too began to re-examine the strike rights of federal

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85. *Id.* at 885 (Wright, J., concurring).

86. Public Employees' Right to Concerted Activity Means Striking, Montana Supreme Court Affirms, [Jan.-Mar.] Gov't Empl. Rel. Rep. (BNA) No. 590, at B-7 (Jan. 27, 1975).

87. *California Courts Void Mandatory No-Strike Oath*, [July-Sept.] Gov't Empl. Rel. Rep. (BNA) No. 722, at 15 (Aug. 22, 1977).

88. Arnold M. Zack, *Impasses Strikes, and Resolutions*, *in* PUBLIC WORKERS AND PUBLIC UNIONS, *supra* note 59, at 101, 103.

89. *Public Opinion Seen Swinging Against Government Employee Unions; Productivity Advances Protected*, [Oct. 6-Dec. 29] Gov't Empl. Rel. Rep. (BNA) No. 626, at Z-1, Z-2 (Oct. 6, 1975).

90. B.V.H. Schneider, *Public Sector Labor Legislation—An Evolutionary Analysis*, *in* PUBLIC SECTOR BARGAINING: INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES 191, 203 & n.32 (Benjamin Aaron, Joseph R. Grodin & James L. Stern eds., 1979).

workers. A first step in this direction came when the House Post Office and Civil Service Committee (HPOCS) reported out a bill in 1973 that would have granted postal workers the right to strike. As Representative Charles H. Wilson (D-CA) explained, the bill was necessary to give the unions "an 'equal hand' in bargaining with management."[91] The chairman of the Senate Post Office and Civil Service Committee, Gale McGee (D-WY), meanwhile, called for a law that would "place labor-management relations in the federal sector on a statutory foundation similar to the National Labor Relations Act in the private sector."[92]

As references to an "equal hand" or a federal policy "similar" to that of the private sector suggest, the legitimization of public sector strikes in the late 1960s and early 1970s emerged from the idea that both the cause of justice and efficient labor relations would be well served by balancing workers' powers against those of their employers. The assumption that labor law ought to balance weapons—the very assumption that lay at the heart of the Supreme Court's 1938 *Mackay* doctrine[93]—thus provided liberating leverage to public sector workers and their unions who sought the right to strike in this period. Some officials of the Nixon administration even accepted this view. William Usery, who served as undersecretary of Labor and director of the Federal Mediation and Conciliation Service (FMCS) under Nixon, as well as Secretary of Labor under Gerald R. Ford, was a proponent of the weapons-balancing argument. Usery explained that as a "general rule" he favored strike rights for federal workers. Unless federal workers won the right to strike, he worried, federal employees would soon be "isolated from the rest of the nation's workforce as the only group denied the legal right to strike."[94] This outcome, in his

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91. *House POCS Subcommittee Reports Out Right to Strike Legislation for Postal Workers*, [Oct.-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 525, at A-8 (Oct. 15, 1973).

92. *Labor Relations Act for Federal Employees Again Urged by Unions*, [Apr.-June] Gov't Empl. Rel. Rep. (BNA) No. 506, at A-7 (June 4, 1973).

93. NLRB. v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

94. *Usery Creates Stir With Claim that Federal Employees are "Becoming Isolated" Without Full Bargaining Rights*, [July-Sept.] Gov't Empl. Rel. Rep. (BNA) No. 564, at A-4 (July 22, 1974).

view, "would not be acceptable."[95]

## II. TURNABOUT YEARS: PROBLEMATIZING THE (PUBLIC SECTOR) STRIKE, 1975-1981

By the mid-1970s, government workers had gone far toward legitimizing public sector strikes by arguing that the private sector labor relations model ought to be imported into government. By January 1976, 37 states had enacted collective bargaining statutes covering some or all public sector workers in their states.[96] In two other states, attorney general opinions authorized collective bargaining; in Illinois a governor's executive order did the same, and in New Mexico a state personnel board instituted it.[97] That left just nine states without any collective bargaining policy in place.[98] Moreover, jurisdictions from New York to California were considering the liberalization of strike rights in government employment.[99]

Government unionists had good reason to believe that they would complete the process of importing the private sector labor relations model into the public sector. Signifying this hope was the National Public Employee Relations Act (NPERA), a bill promoted by AFSCME and other public sector unions, which amounted to "a Wagner Act for public

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95. *Id.* Under pressure from conservative Republicans who demanded his resignation, Usery would later backtrack from this view. *Usery Nomination Sent to Senate Floor*, [Dec. 30-Apr. 4] Gov't Empl. Rel. Rep. (BNA) No. 642, at A-5 (Feb. 2, 1976).

96. Joan Weitzman, *Current Trends in Public Sector Labor Relations Legislation*, 5 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 233, 233 (1976).

97. *Id.*

98. *Id.*

99. In January 1975, New York state legislators began considering changes to the New York City charter in order to legalize municipal strikes, while in California a legislative commission cited "the futility of strike prohibitions" and recommended relaxation of such bans. *See N.Y. State Charter Revision Commission Urged to Reform New York City Municipal Labor Relations*, [Jan.-Mar.] Gov't Empl. Rel. Rep. (BNA) No. 594, at B-3 (Feb. 24, 1975) (discussing New York); BENJAMIN AARON ET AL., REPORT AND PROPOSED STATUTE OF THE CALIFORNIA ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, 232 (Mar. 15, 1973).

employees."[100] Sponsored by Representative William Clay (D-MO), a former AFSCME organizer, the bill would have superseded state labor laws and created a national board analogous to the NLRB to protect the right to organize for all state and local government workers. "We decided that it made much more sense to seek relief through a federal law," explained AFSCME president Jerry Wurf, rather "than to dribble out our lives trying to convince 50 state legislatures, 5,000 city councils, and 10,000 school boards and who knows how many other public bodies to devise an impartial mechanism at the lower level."[101] The Clay bill also promised to extend the right to strike to government workers not responsible for protecting public safety. While it was an ambitious measure, its passage seemed feasible in early 1975 due to a fortuitous conjunction of circumstances: Democrats racked up large majorities in the House and Senate in the Watergate-influenced congressional elections of 1974; the Senate lowered the cloture threshold necessary to end filibusters to three fifths (it had previously been two-thirds); and in the cases of *Maryland v. Wirtz* and *Fry v. United States*, the Supreme Court had seemingly recognized the power of federal law to override state and local law in the area of government labor relations policies.[102] For these reasons, not just AFSCME lobbyists, but many impartial observers felt that the passage of the Clay bill or something like it was very likely in 1975.[103]

Not only did the Clay bill fail in the end, it never came to a vote. The historic conjuncture that had seen public sector workers dramatically expand their movement, lay claim to elements of private sector labor relations, and legitimize

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100. For an extended account of the struggle to pass this bill, see Joseph A. McCartin, *"A Wagner Act for Public Employees": Labor's Deferred Dream and the Rise of Conservatism, 1970-1976*, J. AM. HIST. 123 (2008).

101. RALPH J. FLYNN, PUBLIC WORK, PUBLIC WORKERS 83 (1975).

102. *See* Fry v. United States, 421 U.S. 542 (1975) (holding that state and local governments could be compelled to abide by federal wage ceilings); Maryland v. Wirtz, 392 U.S. 183 (1968) (holding that municipal hospitals could be subject to the Fair Labor Standards Act).

103. Stephen L. Hayford & Peter A. Veglahn, *A Questionable Public Sector Bargaining Strategy—Anxiety Arousal*, 4 PUB. PERSONNEL MGMT. 238, 238 (1975); *A Many-Sided Squeeze*, TIME, Dec. 16, 1974, at 31 (stating that Ralph Flynn, executive director of the Coalition of American Public Employees, predicted "certain passage" of the NPERA).

their demand for the right to strike began to collapse in 1975. Over the next six years, the tide turned sharply against government unions. In many ways, the unions held their own against this shifting tide, even expanding their membership despite growing opposition. However, unions lost the initiative in shaping labor policy during these years and they saw politicians, labor relations professionals, and the public alike reject the notion that government workers deserved the right to strike.

There were at least four reasons for this sudden turnabout. First, a fiscal crisis that affected New York City and other local and state governments made politicians at all levels more resistant to the demands of public employees.[104] Second, the surprising new phenomenon of "stagflation" had the perverse effect of simultaneously ballooning government deficits, goading government workers into increasingly unpopular strikes for wage increases to offset raging inflation, and recruiting a generation of worried suburbanites into a "tax revolt" that demonized "big government" (and thus government unions).[105] Third, conservatives began to organize in groups such as the Public Service Research Council (PSRC) and the Americans Against Union Control of Government (AAUCG), developing powerful arguments against collective bargaining in the public sector by drawing a connection between the growth of bargaining and the growth of strikes.[106] Finally, the relative stability of the post-war private sector labor relations model, which had once inspired public sector workers, broke down under the combined forces of de-industrialization, deregulation, and a new era of globalization.[107]

The breakdown of stability in private sector labor relations was sudden. Although union density in the private sector had inched steadily downward after 1955, it was only after 1973 that private sector unions began to sense the true dimensions of their growing troubles. Successive energy crises and a fluctuating dollar crippled manufacturing industries, and the share of U.S. jobs generated by that sector fell from around twenty seven percent in 1970 to seven-

104. *See* McCartin, *supra* note 100, at 136-44.

105. *See id.*

106. *See id.*

107. *See id.* (discussing these developments more fully).

teen percent in 1990.[108] Unions won a majority of union recognition elections conducted by the NLRB in every year between 1936 and 1974.[109] But between 1974 and 1998, unions lost a majority of NLRB elections every year.[110] Not surprisingly, the average annual strike rate began to trend down after 1974, dropping by twenty-seven percent in the second half of the 1970s.[111] The deregulation of the airline and trucking industries further weakened entrenched unions. Furthermore, employers became increasingly aggressive in both resisting union formation and trying to break strikes.[112]

Labor historians have repeatedly told the story of private sector union declension in this period in ways that disconnected it from what was happening simultaneously in the public sector. Most narratives of labors' woes in the 1970s point to the failure of the Congress to override a Senate filibuster in 1978 to enact labor law reform.[113] Yet these accounts have not connected that defeat to the failure of William Clay's NPERA bill more than two years earlier. In fact, the resistance to public sector union power that snuffed out hopes for the passage of the Clay bill also helped determined the political landscape on which private sector labor law reform foundered in 1978.

The Clay bill died largely because of rising opposition to

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108. *See* PAUL KRUGMAN, PEDDLING PROSPERITY 263 (1994).

109. *See* 2 HISTORICAL STATISTICS OF THE UNITED STATES, PART B: WORK AND WELFARE 2-352 (Susan B. Carter et al. eds., 2006)

110. *See id.*

111. *See* BUREAU OF LABOR STATISTICS, *supra* note 26 (reporting an average of 334 strikes per year between 1970-1974 and an average of 244 strikes per year between 1975-1979).

112. On the rise of employer resistance in these years, see ROBERT MICHAEL SMITH, FROM BLACKJACKS TO BRIEFCASES: A HISTORY OF COMMERCIALIZED STRIKEBREAKING AND UNIONBUSTING IN THE UNITED STATES (2003), and John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651 (2006). On the rise of strikebreaking by employers after 1974, see Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLS Strikes, 1935-1991*, 16 BERKELEY J. EMP. & LAB. L. 169 (1995).

113. For one such account, see Gary M. Fink, *Fragile Alliance: Jimmy Carter and the American Labor Movement*, *in* THE PRESIDENCY AND DOMESTIC POLICIES OF JIMMY CARTER 783, 788-90 (Herbert D. Rosenbaum & Alexej Ugrinsky eds., 1994).

public sector strikes after the summer of 1975.[114] Support for public sector workers' strikes sank even among private sector union allies, who were increasingly worried about plant closings, facing give-backs at the bargaining table, and inflation and their own tax bills.[115]

Democratic political leaders, once allied with labor, grasped this shifting sentiment as they struggled to reconcile growing budget deficits on one hand with insistent union leaders who sought increased wages and benefits for their inflation-pressed members on the other. Democrats in many cases even began to take the lead in blaming public sector strikes for their budget problems. During a series of prominent labor conflicts in Pennsylvania, New York City, Seattle, and San Francisco in 1975, Democratic officials attacked public sector strikers for holding taxpayers hostage with unreasonable demands during a time of fiscal austerity.[116] Politicians who "stood up to" union demands saw their popularity rise. "Pollster Louis Harris, measuring public opinion trends, [began] advising politicians to run against the unions."[117] All of this pleased labor reporter A.H. Raskin, who wrote: "[c]itizen revulsion—that healthiest of correctives in a democracy—is signaling an imminent end to further retreat by civic authorities into appeasement [of labor]."[118]

Diminishing support for public sector strikes undermined legal assumptions on which Clay's NPERA bill had

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114. For example, Harris polls showed a ten-point drop in public support for teacher strikes between 1974 and 1978. *Harris Poll: Public Opposes Strikes by Teachers, Police, Firefighters*, [July 3-Dec.18] Gov't Empl. Rel. Rep. (BNA) No.790, at 25-26 (Dec. 18, 1978).

115. *See* Nicholas von Hoffman, *The Last Days of the Labor Movement*, HARPER'S, Dec. 1978, at 22 (arguing that during the recession of the mid-1970s, public opinion had "turned so ferociously against striking civil servants that nongovernmental union members [would not] even support them").

116. On the Pennsylvania, Seattle, and New York conflicts, see McCartin, *supra* note 100, at 137-40. On the San Francisco conflict, see RANDOLPH H. BOEHM & DAN C. HELDMAN, PUBLIC EMPLOYEES, UNIONS, AND THE EROSION OF CIVIC TRUST 211-36 (1982).

117. Joan Weitzman, *Current Trends in Public Sector Labor Relations Legislation*, 5 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 233, 245 (1976).

118. A.H. Raskin, *Conclusion: The Current Political Contest*, *in* PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 203, 204 (A. Lawrence Chickering ed., 1976).

been drafted. The legislation had been framed on the belief that the *Wirtz* and *Fry* cases had clearly established the basis for federal legislation that would set the framework for state and local labor policies.[119] This belief proved unfounded. The Supreme Court had a chance to revise its stance on whether the federal government had the right to regulate state and local government labor relations in the case of *National League of Cities v. Usery*.[120] This case concerned whether Congress had exceeded its powers when it extended the wage and hour provisions of the Fair Labor Standards Act to cover state and local government workers in 1974.[121] Most labor observers believed that the court would uphold the Fair Labor Standards Act extension, confirm Congress's regulatory power, and thus solidify the foundation upon which the NPERA would rest.[122] "And then a funny thing happened on the way to the Capitol," as legal analyst Theodore Sachs put it.[123]

The court heard oral argument in the case on March 2, 1976, in the wake of the controversy over public sector strikes had been growing over the previous nine months. Democratic governor of Utah, Calvin L. Rampton argued the case for the appellants. He lost no time in reminding the court of the stakes. If it approved the FLSA extension the court would open the door to far reaching legislation, he observed. "Right now there is pending before the Congress bills that would extend all provisions of the National Labor Relations Act to states, including . . . giving employees the right to strike," Rampton observed, and those bills were being held up "only because of the pendency of this case."[124] If the court let the FLSA extension stand, then it would open the legislative floodgates, after which the anxious governor

119. Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968).

120. 426 U.S. 833 (1976).

121. *Id.*

122. *See generally* Neal R. Pierce, *Major Impact Expected From Decision on Labor Act*, NAT'L J., May 17, 1975, at 740-45.

123. Theodore Sachs, *Federal Regulation of the Public Sector: Implications of* National League of Cities v. Usery, *in* LABOR RELATIONS LAW IN THE PUBLIC SECTOR 12 (Andria S. Knapp ed., 1977).

124. Audio file: Oral Reargument, Nat'l League of Cities v. Usery, Docket No. 74-878 (Mar. 2, 1976), *available at* http://www.oyez.org/cases/1970-1979/1974/1974_74_878.

could foresee "no logical stopping point."[125] The argument was apparently convincing. By a 5-4 vote the Court overturned the FLSA extension, with the majority premising its opinion on the notion that federal regulation of state and local labor relations violated the Tenth Amendment.[126] The notes of Justice Harry Blackmun who concurred with the majority indicate that the fiscal crisis and public sector labor upheaval weighed on the Justices' minds.[127] The implications of the decision were immediately clear: the move to enact a national Wagner Act for public workers was dead.[128] Because Clay's NPERA stood athwart the court's new thinking, it was consigned to the legislative dustbin.[129]

Despite this setback, public strikes did not abate in the second half of the 1970s. To the contrary, they grew more frequent as government workers turned to their most effective weapon to try to force their increasingly resistant employers not to balance government budgets on the backs of underpaid sanitation workers, teachers, and other public employees.[130] The results were predictably combustible, leading several long-time Democratic allies to confront public sector strikers head-on. In a series of sanitation strikes in 1977 and 1978, in Atlanta, Detroit, San Antonio, and Tuscaloosa, Alabama, Democratic mayors—including liberals Maynard Jackson in Atlanta and Coleman Young in Detroit—broke strikes by either firing and replacing strikers or threatening to do so.[131] In these cases tough-talking mu-

125. *FLSA Extension to State and Local Employees Regargued Before the United States*, [Dec. 30-Apr.4] Gov't Empl. Rel. Rep. (BNA) No. 647, at B-7 to -13 (Mar. 8, 1976); Audio file: National League of Cities v. Usery, 426 U.S. 833 (1976), U.S. Supreme Court Oral Reargument, at 13:00 (Mar. 2, 1976), http://www.oyez.org/cases/1970-1979/1974/1974_74_878/reargument/.

126. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976).

127. *See* McCartin, *supra* note 100 at 144-45.

128. *Id.* at 146.

129. For a fuller discussion, see *id.*, at 144-48.

130. During the first half of the 1970s, there was an annual average of 377 public sector strikes, while during the second half of the decade, the annual average jumped by approximately twenty five percent to 469 per year. *See* BUREAU OF LABOR STATISTICS, *supra* note 49, at 4.

131. For a full account of these episodes and their impact, see Joseph A. McCartin, *"Fire the Hell Out of Them": Sanitation Workers' Struggles and the Normalization of the Striker Replacement Strategy in the 1970s*, 2 LAB. STUD. WORKING-CLASS HIST. AM. 67 (2005).

nicipal officials saw their poll numbers rise.[132] Other municipalities followed suit. When seventy fire fighters walked off the job in Vernon, California, on August 23, 1978, protesting a cost-cutting plan adopted in response to the passage of Proposition 13, the city immediately hired replacement fire fighters and changed the locks on the fire station doors.[133] As James Farmer, leader of the Coalition of American Public Employees (CAPE), explained: "The current so-called tax revolt encouraged cities to take a hard line with their public employees. Many people feel that they have public workers over a barrel."[134]

In cases when governments tried to compromise with striking workers, they often faced a backlash from voters, as happened in Memphis in 1978. After making contract concessions in 1977 in deference to a city budget crisis, only to find out that the crisis had been overstated, Memphis fire fighters and police officers staged a series of escalating work stoppages in the summer of 1978, with sanitation workers honoring their picket lines. When Mayor Wyeth Chandler concluded an agreement with the strikers that raised their wages, tax payers grew furious. In response to the public outcry, the city council authorized an amendment to the Memphis charter stating that in the future any municipal employee who participated in a strike would "be conclusively deemed to have resigned his appointment or employment with the City," and barred municipal officials from negotiating an amnesty for strikers. Voters passed the measure handily.[135]

During this same summer of 1978, with a backlash against public sector unions well underway, the effort to pass private sector labor law reform fell two votes short of shutting down a filibuster in the Senate—with Senator

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132. *See id.*

133. *Striking Fire Fighters Fired in Vernon, Cal.*, [July 3-Dec. 18] Gov't Empl. Rel. Rep. (BNA) No. 778, at 18-19 (Sept. 25, 1978).

134. Rick Atkinson, *Public Workers Meeting Stiffer Resistance in Walkouts*, KAN. CITY TIMES, Mar. 18, 1980, at A1, A6.

135. Herbert R. Northrup & J. Daniel Morgan, *The Memphis Police and Firefighters Strikes of 1978: A Case Study*, *in* EMPLOYEE RELATIONS AND REGULATION IN THE 80S, 387, 402-03 (Herbert R. Northrup & Richard L. Rowan eds., 1981).

Howard Baker of Tennessee helping to kill the bill.[136] The public sector strikes that had sowed divisions between Democrats and unions made it easier for three Democratic senators, whose votes labor had once counted on, to support the filibuster.[137]

Public sector strikes continued even though public opinion toward them was changing, causing many union leaders to worry that they would soon suffer a backlash. "I urge you to think twice before calling any strike," Lester Asher, general counsel for the Service Employees International Union, told a public workers conference in November 1978.[138] But few government workers facing inflation and stagnating pay were in a mood to accept Asher's advice. In 1979 an all-time record 593 government strikes involved a quarter of a million government workers and resulted in nearly three million idle workdays.[139] In the first six months of 1980, the strike rate broke another record.[140] A vicious cycle had emerged in which fiscally pressed governments resisted union demands, leading government workers to launch unpopular strikes, which in turn led politicians into more confrontations with unions.

There were no longer as many voices urging a liberalization of anti-strike laws as there had been in the early 1970s. Now the trend went in the other direction. Prominent educator Myron Lieberman, who started out championing collective bargaining for teachers in the 1950s, turned against it by the end of the 1970s, disenchanted by

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136. *See* TAYLOR E. DARK, THE UNIONS AND THE DEMOCRATS: AN ENDURING ALLIANCE 108-11 (1999); *Senate Again Fails to Curb Filibuster on Labor Measure*, N.Y. TIMES, June 9, 1978, at D14.

137. The Democrats who voted to sustain the filibuster were Dale Bumpers (Arkansas), Edward Zorinsky (Nebraska), and John Sparkman (Alabama). Even some of those who remained loyal felt the strain: Senator Jim Sasser of Tennessee voted with labor in this showdown "at considerable political cost to himself" according to *Congressional Quarterly*. *See* Harrison H. Donnelly, *Organized Labor Found 1978 a Frustrating Year, Had Few Victories in Congress*, CONG. Q., Dec. 30, 1978, at 3539, 3540.

138. Lester Asher, Remarks at the SEIU Public Workers Conference 9, 11 (Nov. 13-16, 1978) (excerpts available in the Cornell University Library).

139. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 48, at 4.

140. *See id.*; *Public Sector Strikes on the Increase*, GOV'T UNION CRITIQUE (Pub. Serv. Res. Council), Sept. 26, 1980, at 4.

teachers' strikes.[141] Five states enacted tougher penalties against government strikers between 1978 and 1981.[142] And in 1980, Governor William Milliken of Michigan vetoed legislation that would have granted limited strike rights to 400,000 teachers, hospital, sanitation, and other municipal employees.[143] The strike, seen as an inevitable feature of public sector labor relations at the beginning of the decade, had become increasingly controversial.

## III. LESSONS OF THE PUBLIC MODEL: ERODING STRIKE POWER ACROSS SECTORS, 1981-2005

On March 20, 1980, the nation's leading anti-public sector union organization, the Public Service Research Council (PSRC) held a symposium in Vienna, Virginia, attended by thirty civic leaders and educators. Its members were optimistic. "Public opinion will play a decisive role in the 1980's," Myron Lieberman predicted to the gathering, "and it seems to me public opinion will turn increasingly against public sector bargaining."[144] Although opinion did appear to be shifting in the ways Lieberman indicated, the PSRC still felt that it lacked a true champion for its cause. Too many politicians engaged in ritualistic battles with illegal government strikers only to welcome them back to work after the strikes were over. "Each time public servants strike in violation of court orders, laws or contractual agreements, officials warn that the strikers will be punished, usually by fines or firings or both," only to later offer strikers amnesty as part of the deal ending the walkout, observed *Washing-*

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141. *See Union Advocate Changes Mind*, GOV'T UNION CRITIQUE (Pub. Serv. Res. Council), Feb. 16, 1979, at 4. *Compare* MYRON LIEBERMAN, EDUCATION AS A PROFESSION 334-72 (1956), *with* MYRON LIEBERMAN, PUBLIC-SECTOR BARGAINING: A POLICY REAPPRAISAL (1980).

142. *Compare* HELENE S. TANIMOTO & JOYCE M. NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: STRIKE RIGHTS AND PROHIBITIONS 14 (2d ed. 1978), *with* HELENE S. TANIMOTO & JOYCE M. NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: STRIKE RIGHTS AND PROHIBITIONS 17 (3d ed. 1981).

143. *Right to Strike for Michigan Public Workers Vetoed in Near Miss by Governor*, [July-Sept.] Gov't Empl. Rel. Rep. (BNA) No. 873, at 24 (Aug. 4, 1980).

144. *Scholars See Public Sector Unionism Decline*, GOV'T UNION CRITIQUE (Pub. Serv. Res. Council), Mar. 28, 1980, at 1.

*ton Post* columnist Bill Gold in 1979.[145] This only encouraged more walkouts, Gold argued, for "each time amnesty is granted and illegal acts go unpunished" it became "more likely that other illegal acts will follow."[146] Who could break the cycle?

The PSRC found the champion it was seeking in President Ronald Reagan. Reagan was an unlikely champion in many ways. He was a lifetime member of the Screen Actors Guild, AFL-CIO, the only U.S. President to have led a union. Moreover, as governor of California he had been the kind of politician about whom Gold complained. In May 1972, California faced its first reported strike by state employees when workers on a state water project walked off their job for five days. [147] Although the walkout was illegal, state officials imposed no sanctions on the strikers. Instead, with Reagan's blessing the workers were offered a 12.5 percent raise.[148] The PSRC's national director, David Denholm, had worked for the California Right to Work Committee in the early 1970s, and the experience had led him to distrust Reagan. It seemed to Denholm that as governor Reagan took pains to avoid confronting unions.[149] But the Ronald Reagan who won the presidency at the head of the conservative movement in 1980 was not the same man who governed California in the early 1970s. Reagan had seen the political winds shift against public sector strikes in the mid-1970s, and he had shifted with them.

When nearly 12,000 air traffic controllers employed by the Federal Aviation Administration (FAA) walked off their jobs on August 3, 1981, dissatisfied with a contract offer that fell far short of their demands, Reagan issued a stern warning: if these striking members of the Professional Air Traffic Controllers Organization (PATCO) did not return to work within 48 hours they would be terminated and permanently replaced. The highly trained PATCO strikers, who included a large majority of entire controller workforce,

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145. Bill Gold, *The District Line*, WASH. POST, March 20, 1979, at B14.

146. *Id.*

147. WINSTON W. CROUCH, ORGANIZED CIVIL SERVANTS: PUBLIC EMPLOYER-EMPLOYEE RELATIONS IN CALIFORNIA 41, 236 (1978).

148. *See id.* at 41; *California Strike Ends*, N.Y. TIMES, May 27, 1972, at 12.

149. Interview with David Y. Denholm, Nat'l Dir. of PSRC, in Vienna, Va. (Jan. 28, 2004) (audiotape on file with author).

were incredulous. "I never dreamed that they could eliminate three quarters of the workforce and keep the system working," explained Indianapolis PATCO striker Terry Bobell.[150] But this is exactly what Reagan did.

That Reagan took a strong stance against the strike was not surprising. The strikers had expected the government to assume an aggressive posture. But they also expected that as the strike unfolded the dangers of running a short-staffed system, the costs of cutting back half the nation's scheduled flights, and of training an entire generation of new controllers would force the government to come to terms. The strikers were not far off in their assessment of the strike's impact. By the White House's own accounting, Trans World Airlines lost $10 million on the first day of the walkout alone.[151] Yet despite the terrible costs of resisting the union's demands, the administration did not come to terms. Not only did the administration fire the strikers after the 48-hour deadline, it refused to hire back *any* strikers, even after the union had been decertified and despite the fact that leading Republicans privately asked the president to show mercy to the fired controllers.[152]

The impact of Reagan's action was stunning. The PATCO strike had been unlike any other in U.S. history, unfolding in every state and territory from Maine to Guam. It provided the largest and most public stage imaginable upon which to enact a strike-breaking drama. The symbolic importance of the event is hard to exaggerate. As historian William C. Berman argued, the strike "served notice to the country that a new day in government-labor-management relations had dawned."[153]

The greatest impact of the PATCO strike was not in its broad symbolism, however, but rather in its direct influence

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150. Telephone interview with Terry Bobell, PATCO striker (Aug. 5, 2003) (audiotape on file with author).

151. Late PATCO Developments (11:30 a.m. Tuesday), n.d. [Aug. 4, 1981], OA 10520, David Gergen Files, Ronald Reagan Presidential Library, Simi Valley, Cal.

152. On Kemp's involvement, see Interview by Leo Perlis with Arthur Shostak, Emeritus Professor, Drexel University, Phila. (May 1985) (on file with the Arthur B. Shostak Collection, University of Texas at Arlington).

153. WILLIAM C. BERMAN, AMERICA'S RIGHT TURN: FROM NIXON TO CLINTON 98 (2d ed. 1998).

on employer behavior in both the public and private sectors. In the first weeks after the strike, one government trade unionist feared that the strike would inspire imitation by other government employers.[154] "[N]ow we will have thousands of little Ronald Reagans across the country in every town saying, 'Fire them,' whenever public employees confront them in a labor dispute," he predicted.[155] Judging by the letters Reagan received from mayors around the country, such worries were not ill-founded. One wrote:

> I have experienced on a smaller scale the difficulties associated with taking such a firm position on very delicate matters such as this, and want you to know that as a citizen of the United States, I am very satisfied with your action to terminate those who have decided to disregard an order from the highest authority in the land, the court. Too often in the past we have 'negotiated' away what is right, because it was easier.[156]

Reagan's firing of the air traffic controllers would "make the work of municipal administrators easier in dealing with the public sector labor groups," added the mayor of Garland, Texas.[157] "By his unshakable firmness, Reagan sent a message to public employees unions that cannot possibly be misunderstood," crowed the columnist James J. Kilpatrick.[158] "The president's example will strengthen the hand of local governments everywhere," he prophesied.[159]

Kilpatrick was correct in predicting that public sector employers would feel empowered by Reagan's example. For instance, in the fall of 1981, Ohio teachers reported the most severe wave of contract take-back demands since collective bargaining first came to Ohio schools.[160] In the face of such aggression and cowed by Reagan's example, public un-

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154. *Air Controllers' Strike*, 41 FACTS ON FILE YEARBOOK 1981, at 772 (1982).

155. *Id.*

156. Letter from William Oakley, Mayor, City of Romulus, Mich., to Ronald Reagan (Aug. 14, 1981) (on file with the Ronald Reagan Presidential Library).

157. Letter from Charles G. Glack, Mayor, City of Garland, Tex., to Ronald Reagan (Aug. 21, 1981) (on file with the Ronald Reagan Presidential Library).

158. James J. Kilpatrick, *Lesson of the PATCO Strike is Sinking In*, CLEV. PLAIN DEALER, Nov. 6, 1981, at B18.

159. *Id.*

160. Elizabeth Sullivan, *Public Unions Reach Flash Point*, CLEV. PLAIN DEALER, Sept. 7, 1981, at 7-B.

ions became more timid. According to careful estimates by David Lewin, the number of government workers' strikes dropped by forty percent between 1980 and 1982; the number of work days lost due to strikes dropped by fifty percent over the same period.[161] In New York State, the apparent impact of the PATCO strike was even more dramatic. During the seven years leading up to 1981, New York averaged twenty public sector strikes per year; in the seven years following the PATCO strike the average plummeted by ninety percent to a rate of two strikes per year.[162] In the seven years before PATCO, an average of 24,442 public workers struck each year in New York State; during the same period after PATCO the average was 352.[163] According to Ben Rathbun of the Bureau of National Affairs, the PATCO strike simply had a "devastating impact on employee relations in the federal, state and local sectors."[164] Not only did militancy subside, but so too did the growth momentum that had characterized the public sector movement in the 1960s and 1970s. In one measure of this slowing momentum, the unionization rate of teachers dropped by almost four percent between 1980 and 1982.[165]

The rapid decline in public sector strikes in turn presaged a similar turnabout in the private sector. Private sector labor relations were particularly precarious in the early 1980s. By many measures, the early 1980s were wrenching: the decade began with inflation topping thirteen percent and unemployment exceeding seven percent. An effort by the Federal Reserve Bank of the United States to rein in inflation worsened matters for working-class families. The Fed's shock therapy sent unemployment to nearly ten percent by 1982. During 1981-83, 12.3 percent of the U.S. workforce experienced at least one involuntary job loss. Although

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161. Lewin was forced to estimate because the Reagan administration suspended the collection of data on public sector strikes in 1981. David Lewin, *Public Employee Unionism in the 1980s: An Analysis of Transformation*, *in* UNIONS IN TRANSITION: ENTERING THE SECOND CENTURY 247 (Seymour Martin Lipset ed., 1986).

162. RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK 205-06 (1990).

163. *Id.*

164. *Unions Warned of PATCO Effect*, GOV'T UNION CRITIQUE (Pub. Serv. Res. Council), Nov. 6, 1981, at 5.

165. Lewin, *supra* note 161, at 245.

the economic slowdown did throttle inflation, it came at a cost. It was not until 1987 that unemployment finally receded below seven percent.[166] During these years of insecurity private sector workers saw employers take the offensive. Emboldened by the PATCO strike and the rollback in public sector strike activity, private sector employers began to exploit the latent power of the Mackay doctrine that had lain largely dormant for decades.

During the 1960s, public sector unionists had effectively used the "weapons balancing" argument to advance their campaign to legitimize government workers' strikes. By the 1980s, the law and its underlying assumptions had not changed, but the context within which they operated had begun to change radically.[167] When conditions no longer favored strikes in the public *or* private sector, the "weapons balancing" assumption on which the law rested took on an ominous new meaning.

In their 1973 treatise, *Labor Unions: How To: Avert Them, Beat Them, Out-Negotiate Them, Live With Them, Unload Them*, I. Herbert Rothenberg and Steven B. Silverman argued that "the very keystone of the labor movement . . . is found in the mandate '*Don't cross the picket line!*' It is compliance with this elementary and primitive command which holds the entire labor movement together," they explained.[168] "If unions could not induce or compel enough of their members not to cross picket-lines, then the whole of the labor movement would instantly become as ineffectual and sterile as would its picket-lines."[169] Ten years after Rothenberg and Silverman conceived of a strike-less labor

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166. WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY chs. 2-4 (1987); LAWRENCE MISHEL, JARED BERNSTEIN & JOHN SCHMITT, ECON. POL'Y INST., THE STATE OF WORKING AMERICA, 2000-2001, at 237, 238 & tbl.3.10 (2001).

167. This is not to say that the law remained static. For treatments of the changes that did occur, see generally JOSIAH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT ( 2005); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, (Rutgers Law Sch. (Newark) Faculty Papers, Paper No. 3, 2004), *available at* http://law.bepress.com/rutgersnewarklwps/fp/art3/.

168. I. HERBERT ROTHENBERG & STEVEN B. SILVERMAN, LABOR UNIONS: HOW TO: AVERT THEM, BEAT THEM, OUT-NEGOTIATE THEM, LIVE WITH THEM, UNLOAD THEM 14 (1973).

169. *Id.*

movement, their dream began to materialize. Charles R. Perry, Andrew M. Kramer, and Thomas J. Schneider of the Wharton School were among those who saw to that. Months after the PATCO strike, they published *Operating During Strikes: Company Experience, NLRB Policies, and Government Regulations*, encouraging employers to seize the right to replace strikers that the Supreme Court had granted them in 1938.[170] Up to that point, they noted, this right was not "widely exercised by management" because it was "not institutionally popular."[171] But Reagan had helped change that, they believed. "The dramatic handling of the flight controllers' strike . . . called attention to a relatively new phenomenon in United States industrial relations—the determination of management to operate facilities when employees strike."[172] The hopes of the Wharton School researchers were soon borne out.

In the years between 1950 and 1980, there was roughly one documented case of employers attempting to permanently replace strikers per every seventy-six major work stoppages. In the decade after the PATCO strike, the use of replacement workers became ten times more common: once per seven major work stoppages.[173] Employers willingness to replace strikers, combined with economic insecurity and the

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170. *See generally* CHARLES R. PERRY, ANDREW M. KRAMER & THOMAS J. SCHNEIDER, OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENT REGULATIONS 1 (1982).

171. *Id.* at 1.

172. *Id.* at iii.

173. These ratios were calculated using figures on major work stoppages published by the Bureau of Labor Statistics and figures on cases involving replacement workers heard before the NLRB or the Railway Labor Board as discovered by Michael LeRoy. For relevant data, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 49, at tbl.1, and LeRoy, *supra* note 6, at 198-207. A calculation by the Government Accounting Office (GAO) came up with a slightly different ratio: one use of replacements per nine major strikes in 1985. The GAO study is discussed in Peter Cramton & Joseph Tracy, *The Use of Replacement Workers in Union Contract Negotiations: The U.S. Experience, 1980-1989*, 16 J. OF LAB. ECON. 667, 672 (1998). Yet a study by Cynthia Gramm of strikes in New York and across the nation cited a ratio of approximately one use of replacements for every five strikes across the nation. Cynthia Gramm, *Employers' Decisions to Operate During Strikes: Consequences and Policy Implications*, *in* ECON. POL'Y INST., EMPLOYEE RIGHTS IN A CHANGING ECONOMY: THE ISSUE OF REPLACEMENT WORKERS (William Spriggs ed., 1991), *available at* http://www.epi.org/publications/entry/epi_virlib_studies_1991_seminare/.

increased hostility of the Reagan-era NLRB, frightened workers and unions and sent the strike rate tumbling after 1981.[174] After 1980, the pattern of strike activity began to diverge from the business cycle for the first time since World War II. [175] During the 1960s and 1970s, the rate of major work stoppages in the United States rose slightly, from 283 per year in the first decade to 289 per year in the second. Yet during the 1980s, the bottom fell out of the major work stoppage rate as it dipped to eighty-three per year. During the 1990s, it fell further to thirty-four, and in the first five years of the twentieth century it was a mere twenty-four per year. In 2002, the nation reached an astonishing point: only nineteen major work stoppages took place that year, involving only 46,000 workers—only 1/60th of the number of workers who had been involved in major work stoppages fifty years earlier in 1952.

Efforts to restore whatever balance had once existed in laws governing strikes came to naught. "[A]t least nine separate congressional hearings [were] devoted to the issue between 1988 and 1995."[176] Those hearings eventually produced a viable bill that would restrict employers' ability to replace strikers. The bill reached the floor of Congress during President Bill Clinton's first term only to be derailed by a Senate filibuster. After that, organized labor seemingly gave up its effort to recapture the power to strike, apparently judging it to be a futile cause.[177]

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174. For example, the Reagan era NLRB further weakened workers' ability to strike effectively by withdrawing what had once been "statutorily protected strike and picket line conduct." JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994, at 263 (1995). Past boards had consistently held that verbal abuse of strike-breakers by picketers was permissible if non-violent. *Id.* The Reagan board took a different view in the *Clear Pine Mouldings* case, "finding oral threats alone sufficient justification for discharging employees if the threat 'reasonably tended' to coerce or intimidate [non-striking] employees in the exercise of their rights." *Id.*

175. Bruce E. Kaufman, *Research on Strike Models and Outcomes in the 1980s: Accomplishments and Shortcomings*, *in* RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 77-132 (David Lewin, Olivia S. Mitchell & Peter D. Sherer eds., 1992).

176. Timothy J. Minchin, *Permanent Replacements and the Breakdown of the "Social Accord" in Calera, Alabama, 1974-1999*, 41 LAB. HIST. 325, 372 (2001).

177. The main labor law reform being debated today, the Employee Free Choice Act, makes no specific effort to redress the imbalances that have effectively robbed workers of the power to strike. The EFCA campaign stresses

By the early twenty-first century, two ironies were clear. First, although private sector workers still possessed the right to strike, their strikes had become as rare as public sector strikes had been in the 1950s when they were illegal in every jurisdiction, before the bid to legitimize government strikes had begun. Second, the long struggle of public workers to legitimize their right to strike had become deeply entangled in the story of private sector workers' rights to strike, and in unintended ways the public sector workers' upsurge had helped trigger counterattacks that suppressed strikes in both public and private sectors.

The long story that produced these twin ironies both complicates and confirms the view of the law and its underlying assumptions that James Atleson laid out twenty-five years ago. The history of the government workers' movement reminds us that even apparently conservative constructions, such as the "weapons balancing" assumption at the heart of the *Mackay* dictum, once harbored liberating implications, at least for some workers–a factor that his focus on the private sector law led Atleson to overlook. Moreover, this story suggests that the impact of the law and the significance of the assumptions that undergirded it could change in different times and contexts: values and assumptions that proved oppressive in one context might prove liberating in another, and those that proved liberating in one period might prove oppressive in another. The significance of the values and assumptions that informed labor law was determined by historical contingencies and contexts that extended far beyond the courts and their rulings. Yet this long story also confirms the basic truth of Atleson's argument over the long run. "No doctrine more readily reveals" the impoverished nature of workers' rights under American labor law, Atleson presciently wrote in 1983, than the *Mackay* doctrine, which "mocks the protection of the right to strike."[178] The events that have unfolded since then have confirmed the wisdom of Atleson's observation—perhaps in more emphatic ways than he could have ever foreseen. And, as that important observation makes clear, those who seek

protecting the right to organize, but ignores the development of structural impediments that have made the construction of workplace solidarity more difficult. For a critique of that approach, see generally Joseph A. McCartin, *Re-Framing U.S. Labour's Crisis: Reconsidering Structure, Strategy, and Vision*, 59 LABOUR/LE TRAVAIL 133 (2007).

178. ATLESON, *supra* note 1, at 179.

to understand the near disappearance of the strike (or indeed the fate of U.S. labor in general over the last half century) will continue to find in James Atleson's path-breaking work insights worth pondering.